

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ALAN BIBLER, a/k/a MARK ALLAN
BIBLER,

Defendant-Appellant.

UNPUBLISHED

September 25, 2003

No. 234683

Jackson Circuit Court

LC No. 00-006018-FH

Before: Bandstra, P.J., and Gage and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of one count of preparation to burn property over \$20,000, in violation of MCL 750.77(1)(d). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to ten to twenty years' imprisonment. We affirm.

On the night of the incident, defendant returned to his apartment following several days of heavy drinking. After entering the apartment, defendant poured gasoline over the carpet and then fell asleep on the couch. Officer Keith Flores, of the Jackson Police Department, was called to defendant's apartment after one of defendant's neighbors smelled the odor of gasoline coming from the apartment. When the officer woke defendant up, defendant became belligerent and was arrested for disorderly conduct. After being released from jail, defendant returned to his apartment and packed his belongings, intending to enter an alcoholism in-patient treatment program. Defendant was subsequently arrested for the instant offense.

Defendant raises several evidentiary issues on appeal. The decision whether to admit evidence is within the trial court's discretion and will not be disturbed on appeal absent an abuse of that discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002); *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

Defendant argues that the trial court abused its discretion in allowing a napkin and carpet samples taken from defendant's apartment to be allowed into evidence. Generally, all relevant evidence is admissible. MRE 402. Relevant evidence is "evidence having any tendency to make

the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. Even if relevant, however, evidence may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MRE 403. Unfair prejudice results when minimally probative evidence might receive consideration from the jury substantially out of proportion to the logically damaging effect of the evidence, or when it would be inequitable to allow the use of the evidence. *People v McGuffey*, 251 Mich App 155, 163-164; 649 NW2d 801 (2002).

Defendant was charged with arson – preparation to burn property over \$20,000. The challenged evidence consisted of a napkin that appeared to have been burned and samples of carpet that appeared to have been saturated with gasoline. These items are consistent with a preparation to commit arson, and are, therefore, relevant. Further, given the fact that the prosecution had introduced testimony that defendant had stated earlier in the evening that he intended to pour gasoline in his apartment and to burn the building down, and that defendant had in fact lit a napkin or rag on fire, which a witness managed to take away and extinguish, the challenged evidence was extremely probative. Under the circumstances, the trial court did not abuse its discretion in admitting the evidence.

Defendant also argues that the trial court abused its discretion in permitting a police officer to testify that defendant was on parole at the time he committed the instant crime. Because defendant did not object to the officer’s testimony regarding defendant’s parole status, nor did he request a curative instruction or move for mistrial, this issue is unpreserved for our appellate review. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Therefore, defendant may obtain relief only upon a showing that the error is plain and affected his substantial rights in that it affected the outcome of the proceedings, and it either resulted in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of the proceedings. *Id.*

Reference to defendant’s parole status came in the form of an unresponsive, unsolicited comment by the officer who arrested defendant. The prosecutor neither commented on, nor followed up on the unresponsive statement. Even if the fleeting reference to defendant’s parole status constituted error, given the strength of the evidence against defendant in this case, defendant has failed to demonstrate that the error affected the outcome of this case.

Defendant’s next issue regards his being handcuffed and shackled during the jury voir dire and shackled during trial. The decision to shackle or otherwise restrain a defendant is within the sound discretion of the trial court, and this Court reviews the decision for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). To justify reversal of a conviction on the basis of a defendant being shackled or improperly attired, the defendant must show that prejudice resulted. *People v Robinson*, 172 Mich App 650, 654; 432 NW2d 390 (1988).

Defendant was seated with handcuffs and shackles on when the jury pool was brought into the courtroom. Once defense counsel realized defendant was wearing the restraints, the court held a bench conference at which it was apparently decided that defendant could either have the handcuffs removed in front of the jury or he could remain seated with his hands under

the table in an attempt to hide the handcuffs from the jury's view.¹ Defendant opted to keep the handcuffs on and attempt to hide his hands beneath the table. After the jury left the courtroom, defense counsel moved to have defendant's handcuffs removed during trial, which the court granted; however, nothing was mentioned about defendant's shackles and defendant remained shackled throughout trial, except during defendant's testimony, for which the shackles were removed.

It is well settled that a trial court has broad discretion in controlling the course of a trial. *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002). Freedom from shackling has long been recognized as an important component of a fair trial because having a defendant appear before a jury handcuffed or shackled can negatively affect the defendant's constitutionally guaranteed right to a presumption of innocence. *Id.*, citing *People v Dunn*, 446 Mich 409, 426; 521 NW2d 255 (1994). Thus, "the shackling of a defendant during trial is permitted only in extraordinary circumstances." *Dixon, supra* at 404, citing *People v Jankowski*, 130 Mich App 143, 146; 342 NW2d 911 (1983). "Restraints should be permitted only to prevent the escape of the defendant, to prevent the defendant from injuring others in the courtroom, or to maintain an orderly trial." *Id.*, citing *Dunn, supra*. Moreover, the existence of such circumstances must be supported by the record evidence. *Id.*

In this case, there are no facts in the record to support the restraining of defendant. The record contains no information whatsoever about security risks, if any, associated with defendant. Moreover, the trial court made no record regarding any circumstances necessitating the restraint of defendant. Instead, it appears defendant was inadvertently handcuffed in front of the jury pool and defense counsel assumed it was the trial court's policy to shackle defendant during trial. In light of the fact that "every defendant is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man, except as the necessary safety and decorum of the court may otherwise require," *People v Shaw*, 381 Mich 467, 472-473; 164 NW2d 7 (1969), quoting *Eaddy v People*, 115 Colo 488; 174 P2d 717 (1946), we find it was error for defendant to have been restrained without reason.

To justify reversal of defendant's convictions, however, it is incumbent on defendant to show he was prejudiced by the use of the restraints. *People v Johnson*, 160 Mich App 490, 493; 408 NW2d 485 (1987). A finding that the jury was unable to see the defendant's restraints can render the error harmless. *Id.* Thus, the question before this Court is to what extent did the unreasonable placement of restraints on defendant prejudice his case and cause bias to the jury's determination of his guilt or innocence.

Defendant asserts on appeal that a review of the trial tape clearly shows that the jury could see defendant's handcuffs and shackles. Beyond the viewing of the trial tape, defendant produces no evidence that any juror actually saw defendant's restraints. We have reviewed the pertinent portions of the trial tape referred to by defendant and our review is not dispositive of whether any members of the jury pool actually saw or could have seen defendant handcuffed

¹ This case was remanded to the trial court for the specific purpose of an evidentiary hearing to determine what was discussed during the bench conference.

with his hands under the table. The video is shot from angles that either display the courtroom from the perspective of the trial judge or display the trial judge on or near the bench. From these angles, it is unclear whether a potential juror could see the handcuffs or shackles. In fact, at the evidentiary hearing, defense counsel himself indicated that he did not know whether the jurors could see defendant's handcuffs, and explicitly stated, using a double negative, that the view "would not have been unfettered" – meaning that it would not have been a clear view of the handcuffs or leg shackles. Because the handcuffing of defendant during the jury voir dire appeared to be inadvertent and defendant has provided no evidence that the jury actually saw the restraints or that the restraints affected any juror's decision in this case, we find defendant has failed to demonstrate prejudice.

Further, with regard to the shackling of defendant during trial, the record does not reflect the reasons defendant was placed in leg shackles, other than that it was the "normal practice" of the trial court. In fact, it appears that defense counsel failed to challenge the procedure because he was of the impression that the court had an unwritten rule that all defendants remain shackled.² Shackling is an extreme measure that trial courts must take seriously because of the potential for the restraints to mar a defendant's credibility and indicate to the jury that the defendant is not to be trusted. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 546; 560 NW2d 651 (1996). Generally, "[f]reedom from shackling and manacling of a defendant . . . has long been recognized as an important component of a fair and impartial trial." *People v Duplissey*, 380 Mich 100, 103; 105 NW2d 850 (1968). Thus, clearly shackling should never be common practice in a courtroom, nor should a trial court have an "unwritten rule" requiring shackling in all cases.

In defendant's case, however, defense counsel failed to challenge the shackling procedure or request that defendant's shackles be removed. More importantly, on appeal, defendant has failed to provide evidence that any jury members actually saw the shackles, or that the jury's decision was tainted by the view of the shackles. Because defendant has failed to demonstrate the requisite prejudice, reversal is not required.³

Defendant's final issue on appeal regards his sentence. Defendant argues that the trial court abused its discretion in sentencing defendant to 10 to 20 years' imprisonment because the court failed to articulate any reasons on the record for such a severe sentence and because the sentence is far out of proportion to the case.

² We note that defendant's shackles were removed before defendant took the stand to testify on his own behalf.

³ We note our disapproval of the way that all parties involved handled the restraining of defendant in this case. We stress that our decision not to reverse rests only on our finding that the record does not contain sufficient indicia that the jury was contaminated and defendant was prejudiced. We also note that we are most uneasy by the notion that a trial court in this state might have a blanket requirement that all defendants be shackled during jury trials without explanation. If such a practice does indeed exist, it is contrary to established case law and should not continue. See *People v Jankowski*, 130 Mich App 143, 146; 342 NW2d 911 (1983).

The parties agree that there were no sentencing guidelines applicable to defendant's offense in this case. Although the offense was committed after January 1, 1999, the legislative guidelines for defendant's particular offense – preparation to burn property over \$20,000 – did not take effect until October 1, 2000. Therefore, the parties agree that there was no guideline to be followed.⁴ However, defendant contends that his sentence is disproportionate and constitutes cruel and unusual punishment.

MCL 750.77(1)(d) provides that a person convicted of preparation to burn property over \$20,000 is punishable by imprisonment for not more than ten years. MCL 769.12(1)(a), which governs sentencing of habitual offenders with three or more felony or attempted felony convictions, enhances the maximum sentence to imprisonment for life or a lesser term. Accordingly, the trial court could have sentenced defendant as a fourth habitual offender to any term up to life imprisonment. Defendant's sentence of 10 to 20 years' imprisonment is clearly within the statutory limits established by the Legislature.

Moreover, although the majority of defendant's prior felonies were alcohol-related, his criminal background reveals defendant's inability to conform his conduct to the laws of society. The trial court gave a lengthy discussion on the record regarding the reasons for defendant's sentence; therefore, in light of the circumstances of the crime as well as defendant's extensive criminal background, we find the trial court did not abuse its discretion in sentencing defendant to 10 to 20 years' imprisonment.

Affirmed.

/s/ Richard A. Bandstra

/s/ Hilda R. Gage

/s/ Bill Schuette

⁴ Neither party asserts that the judicial guidelines apply to defendant's offense. Regardless, we note that the judicial guidelines do not apply to habitual offenders. *People v Hansford (After Remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997).